In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-212

UNITED STATES OF AMERICA,
Petitioner

- vs -

THOMAS W. DONOVAN, *et al.*,
Respondents

Brief of Respondents Merlo and Lauer in Opposition to Petition For A Writ of Certiorari

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BRIEF OF RESPONDENTS MERLO AND LAUER IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the government has the duty to exercise care in furnishing to the District Court the identity of persons unnamed in a wiretap order whose conversations have been overheard in the course of interception and against whom the government intends to obtain indictments, so that the court may exercise its statutory discretion under 18 U.S.C. § 2518 (8)(d) to serve persons not named in the interception order with the inventory notice.

2. Whether suppression of a wire interception is justified where through advertence or gross negligence the government failed to supply the District Court with the names of individuals whose conversations were secretly intercepted, so that the District Court was misled into omitting them from its inventory order, and where the

persons whose conversations were intercepted had neither actual notice nor statutory notice of the interceptions and did not learn of the interceptions except in response to their post-indictment discovery motions more than a year after the interceptions occurred.

STATUTORY PROVISIONS INVOLVED

The relevant portions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2510-2520) are set forth in Appendix E of the Petition for Certiorari at pp. 59a - 63a.[1]

COUNTERSTATEMENT OF FACTS

History

Respondents Merlo and Lauer were indicted on November 1, 1973, together with a number of other persons, on charges of conspiracy to operate and operation of a gambling business in violation of 18 U.S.C. §§ 371 and 1955. On November 30, 1973, a motion for discovery was filed on behalf of Merlo, pursuant to which respondents learned that the government intended to introduce about twelve telephone conversations which had been intercepted by wiretap between December 9, 1972 and January 3, 1973. These respondents filed a motion to suppress on December 12, 1973, arguing *inter alia,* that they had never received notice of the interception in accordance with 18 U.S.C. § 2518 (8)(d). This contention was sustained by the District Court, which granted the Motion to Suppress on this issue on January 17, 1974.

The government appealed the decision to the United States Court of Appeals for the Sixth Circuit which affirmed the District Court's decision on March 17, 1975.

[1]The opinion and orders below are also appended to the Petition for Certiorari. App. A-D, pp. la-58a. The opinion of the United States Court of Appeals for the Sixth Circuit is published at 513 F.2d 337 (6th Cir. 1975).

On August 8, 1975, the government filed its petition for certiorari herein and pursuant to motion, this Court extended respondents' time for filing an opposing brief to October 9, 1975.

Circumstances Surrounding the Wire Interceptions

The wiretaps in question were made pursuant to an order entered by a District Judge on November 28, 1972, authorizing interception of communications of six named individuals "and others, as yet unknown" to and from four designated telephones for fifteen days (C.A. App. 66-69).[2] On December 26, 1972, additional orders were entered modifying the November 28 order and extending it for an additional fifteen days, and enlarging the surveillance to include an additional named individual and an additional telephone (C.A. App. 103-110). Respondents Merlo and Lauer were not named in either the November 28 or the December 26 orders.

On February 21, 1973, a District Judge ordered the government to serve an inventory notice upon thirty-seven persons whose communications had been intercepted (C.A. App. 118-120), including many persons who had not been named in the interception order. The names of the persons upon whom the judge directed service of notice had been furnished to the court by an attorney with the Justice Department, who in turn had received the names from an F.B.I. agent (C.A. App. 197). Merlo and Lauer were not among those named in the inventory order and were not served with notice (Petition for Certiorari, p. 4).

The list of persons to be served was prepared by the government on the basis that all persons "positively identi-

[2]Citations to the record below are designated by reference to the appropriate page of the Court of Appeals Appendix, abbreviated "C.A. App." Citations to the opinions below are designated by the pages of the Appendix to the Petition for a Writ of Certiorari (abbreviated "P.C. App.") where they appear.

fied" were to be served with notice (C. A. App. 197). However, on September 11, 1973, the government filed a motion for an amended inventory order, representing in substance, that two persons, named Harvey Trifler and James Blank, had not been included in the inventory order and had not been served with notice by reason of "administrative oversight" (C.A. App. 129-131). The motion was granted (*Id.* at 134-135). Merlo and Lauer were not named in the motion for an amended inventory order and did not receive notice pursuant to the amended order (Petition for Certiorari, p. 4).

Merlo and Lauer were well-known to the government and were positively identified suspects in the investigation by not later than January 1973. By that time, their telephone communications had been intercepted as described above; they had been personally interviewed by F.B.I. agents who had obtained admissions from them (C.A. App. 219-220); and they had been identified as present during a search of the premises pursuant to warrant on January 13, 1973 (C.A. App. 215).

In his consideration of the motions to suppress filed on behalf of defendants Merlo and Lauer, District Judge Robert B. Krupansky found that "defendants Merlo and Lauer were not served with inventories pursuant to the Act or otherwise notified that they had been intercepted" (P.C. App. 54a), and that "in the interests of justice their communications must be suppressed" (*ibid.*).

Government's Factual Contentions Not Supported By The Record.

Two aspects of the petitioners' recitation of the facts merit special refutation.[3] First, petitioners assert that the omission of notice to Merlo and Lauer was an "inadvertent administrative error" (Petition for Certiorari, p. 18), and

[3] These respondents do not concede that the statement of facts in the Petition for Certiorari is otherwise necessarily correct.

that "[a]pparently, the names of Merlo and Lauer were not transmitted to the judge because of a failure of communication between the F.B.I. and the prosecutor (App. A, *infra*, p. 15a)." There is no testimony to support this assertion. While the government asserted "administrative oversight" as the reason for seeking an amended order naming Trifler and Blank (C.A. App. 129-131), there is no record on the reason for the further omissions of Merlo and Lauer from the motion for an amended order at a time when these respondents had been positively identified. The petitioner's record citation (App. A. P. 15a) in support of this assertion is merely a reference to the same self-serving contention as recited, but not approved, in the opinion of the Court of Appeals below. In view of the failure of the government to include these respondents after its representatives had noted the omissions of Trifler and Blank and presumably checked the records with some care, the assertion that the failure is mere inadvertence is excessively self-forgiving on the part of the government. If not deliberate, this second omission of names from a purportedly complete list was a grossly negligent misrepresentation to the District Court.

Second, the government urges that these respondents had "actual notice" of the wiretap. This assertion is barred by the finding of the District Judge that they had not been "otherwise notified" (P.C. App. 54a), and the Court of Appeals below so held (P.C. App. 15a).[4]

[4] The Court below also refused to infer knowledge from the fact that 39 others received notice.

"Others may have communicated the fact of interception to Merlo and Lauer, but this would not necessarily lead them to believe that they had been intercepted. It is just as reasonable to assume that Merlo and Lauer would believe that, since they had not received notice, their conversations were not intercepted." P.C. App. 15a.

The Court below found that

"[t]he only evidence of notice in the record is in response to Merlo's and Lauer's motions for discovery, filed after their indictments and more than a year after the actual interceptions. If these defendants had never been indicted, they might well have never received notice of the interceptions." (P.C. App. 15a).

ARGUMENT: REASONS FOR DENYING THE WRIT

1. This case does not present for review the question of the scope of the government's duty to advise the court of the identity of persons whose conversations have been overheard for purposes of the court's exercise of discretionary authority to serve them with notice under 18 U.S.C. 2518 (8)(d).

While the government asserts that this case presents the question "[w]hether the government has the duty under 18 U.S.C. 2518 (8)(d) to advise the court of the identity of every person whose conversations have been overheard"[5] it simply does not.

Title III is silent on the duty of the government to inform the court of the identity of persons overheard. It merely provides, in pertinent part, that

> "Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518 (7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, *and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice*, an inventory which shall include notice of –
>
> (1) the fact of the entry of the order or the application;

[5]Petition for Certiorari, p. 2.

> (2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and
>
> (3) the fact that during the period wire or oral communications were or were not intercepted . . ." 18 U.S.C. 2518 (8)(d) (Emphasis added).

It is obvious, as the court below noted, that

> "The judge has no independent information as to the unnamed parties who have been overheard on the intercepts and must depend on the Government to disclose that information in order that he may exercise his discretion. (P. C. App. 14a)."

However, the court below did not rule that the government must furnish "all" names of persons overheard, it merely recited approval of the much less onerous standard adopted in the Ninth Circuit in *United States v. Chun*, 503 F. 2d 533 (9th Cir. 1974):

> "[A]lthough the judicial officer has the duty to cause the filing of the inventory, it is abundantly clear that the prosecution has greater access to and familiarity with the intercepted communications. Therefore we feel justified in imposing upon the latter the duty to classify all those whose conversations have been intercepted, and to transmit this information to the judge. Should the judge desire more information regarding these classes in order to exercise his § 2518 (8)(d) discretion, we also hold that the government is required to furnish such information as is available to it. *Id.*, at 540 (footnote omitted), quoted below at P. C. App. 14a.

Even the validity of the lesser and eminently reasonable standard adopted in *Chun, supra,* is not presented by this appeal. There is no indication that the District Judge below imposed *any* standard upon the government. The government concedes that

> "[i]t is the current practice of the Department of Justice to provide the supervising judge with the name

> of every person who has been overheard if there is judged to be any reasonable possibility that the person will be indicted." Petition for Certiorari, p. 12, fn. 10.

And the government attorney testified that *he* made the determination to include persons in the inventory if they were "positively identified." (C.A. App. 197).

By the standards employed by the government, Merlo and Lauer should have received notice. It was the unmistakably implied representation of the government to the District Judge that all names of positively identified persons to be indicted had been included in the list, and the judge's disposition of this matter demonstrates that he would have exercised his discretion to give these respondents notice if he had not been prevented from so doing by the government's deliberate or negligent withholding of their names.

Even the adoption of a less onerous standard could not have affected the outcome of this case. Whatever policy for informing the District Judge may ultimately be approved by the federal judiciary, that policy is not likely to forgive the government of all responsibility for meeting it with care, or to require informing the judge of all persons overheard except those whom the government negligently forgets or deliberately ignores. No conflict has yet arisen among the lower federal courts in the delineation of the extent to which the government must endeavor to inform the court of the identity of unnamed persons overheard. This case does not present that issue, and involves only a failure to carry out the plan of disclosure which the government represented it was observing and upon which the court necessarily relied in framing its inventory order. Therefore, this case is not an appropriate vehicle for reviewing the government's duty to identify to the judge unnamed persons whose conversations have been overheard.

2. Supreme Court Review Of Suppression As A Remedy For Prosecution Induced Failure To Serve The Inventory Notice In Accordance With 18 U.S.C. ∫ 2518(8)(d) Is Unnecessary.

(a) The courts below correctly decided that suppression is justified for violation of the inventory notice requirements of 18 U.S.C. ∫ 2518(8)(d).

Prior decisions of this Court and the legislative history of Title III compel conclusion that the inventory notice provisions of 18 U.S.C. § 2518(8)(d) were mandated by the Fourth Amendment, and were regarded by Congress as fundamental to the constitutional validity of the Act.

In *Berger v New York,* 388 U.S. 41 (1967), this Court applied the Fourth Amendment's prohibition of unreasonable searches and seizures to wiretaps and electronic eavesdropping, and invalidated New York's eavesdropping law for failure to meet Fourth Amendment criteria. One of the specific fatal defects noted in *Berger* was that:

> ". . . the statute's procedure, necessarily because its success depends on secrecy, *has no requirement for notice as do conventional warrants,* nor does it overcome this defect by requiring some showing of special facts. On the contrary, it permits uncontested entry without any showing of exigent circumstances. Such a showing of exigency, in order to avoid notice would appear more important in eavesdropping, with its inherent dangers, than that required when conventional procedures of search and seizure are utilized. *Nor does the statute provide for a return on the warrant thereby leaving full discretion in the officer as to the use of seized conversations of innocent as well as guilty parties.* In short,, the statute's blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures." (Emphasis added) *Id.* at 60.

A few months later this Court struck down a federal warrantless search, in part, because the searching officers were not

> "directed, after the seaching had been completed, to notify the authorizing magistrate *in detail of all that had been seized.*" *Katz v. United States,* 389 U.S. 347, 356 (1967). (Emphasis added).

The framers of the Omnibus Crime Control and Safe Streets Act expressly reported that

> "[w]orking from the hypothesis that any wiretapping and electronic surveillance legislation should include the . . . constitutional standards [of *Berger* and *Katz*], the sub-committee has used the *Berger* and *Katz* decisions as a guide in drafting Title III." Senate Report (Judiciary Committee), No. 1097, 2 U.S. Code Congressional and Administrative News 1968, p. 2163.

The requirement "to notify the authorizing magistrate, after the search, of all that had been seized" found lacking in *Katz,* was one of the constitutional standards specifically noted by the sub-committee. *Id.* at 2162. Accordingly, the portion of the section-by-section analysis, contained in the Senate Report 1097, on subparagraph (d) of paragraph (8), describes the purposes of the inventory notice in mandatory and constitutional terms:

> "Subparagraph (d) places on the judge the duty of causing an inventory to be served by the law enforcement agency on the person named in an order authorizing or approving an interception. This reflects existing search warrant practice. See Federal Rules of Criminal Procedures, 41(c); *Berger v. New York,* 87 S.Ct. 1873, 388 U.S., 41 (1967); *Katz v. United States,* 88 S.Ct. 507, 389 U.S. 347 (1967). The inventory must be filed within a reasonable period of time, but not later than 90 days after the interception is terminated. It must include notice of the entry of the order, the date of its entry, the period of authorized or approved interception, and whether or not wire or

oral communications were intercepted. On an ex parte showing of good cause, *the serving of the inventory may be, not dispensed with, but postponed.* For example, where interception is discontinued at one location, when the subject moves, but is reestablished at the subject's new location, or the investigation itself is still in progress, even though interception is terminated at any one place, the inventory due at the first location could be postponed until the investigation is complete. In other situations, where the interception relates, for example, to a matter involving or touching on the national security interest, it might be expected that the period of postponement could be extended almost indefinitely. Yet the intent of the provision is that the principle of postuse notice will be retained. *This provision alone should insure the community that the techniques are reasonably employed.* Through its operation all authorized interceptions must eventually become known at least to the subject. He can then seek appropriate civil redress for example, under section 2520, discussed below, if he feels that his privacy has been unlawfully invaded." *Id.* at 2194. (Emphasis added).

This clear manifestation of congressional intent echoes earlier conclusions of the President's Commission on Law Enforcement and Administration of Justice, the recommendations of which sparked the enactment of Title III. After discussing the particular perniciousness of the surreptitious character of electronic surveillance, and the general Fourth Amendment requirement that "all searches must be on notice," the Commission concluded

> "There is no reason why some sort of inventory procedure applicable to electronic surveillance warrants could not be worked out. Warrant procedures prior to use of electronic equipment and *inventory procedures subsequent to its use would help limit the indiscriminate use of the devices.* More importantly, they would make possible prior and subsequent judicial review of their use and possible abuse." *The President's Commission on Law Enforcement and Ad-*

ministration of Justice, Task Force Report: Organized *Crime,* 80, 97, 103 (1967) (Emphasis added).

The foregoing analysis compels conclusion that the inventory notice provisions of Section 2518(8)(d) are both rooted in Fourth Amendment requirements and intended by Congress as a mandatory element of the legislative scheme to limit indiscriminate use of interception procedures. Given the constitutional dimension of a violation of Section 2518(8)(d), suppression of the communications obtained without compliance with that section is justified on authority of *Weeks v. United States,* 232 U.S. 383 (1914) and *Mapp v. Ohio,* 367 U.S. 643 (1961).

As an important part of the congressional scheme to assure reasonable use of wiretapping and electronic surveillance, the inventory notice requirements are enforceable by suppression in keeping with the guidelines enunciated by this Court in *United States v. Giordano,* 416 U.S. 505 (1974); *United States v. Chavez,* 416 U.S. 562 (1974) and *United States v. Kahn,* 415 U.S. 143 (1974).

Section 2518(10)(a) of Title III provides for suppression of an intercepted communication on the following grounds:

> "(i) the communication was unlawfully intercepted;
>
> "(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> "(iii) the interception was not made in conformity with the order of authorization or approval." 18 U.S.C. § 2518(10)(a).

In *United States v. Giordano, supra,* this Court held that the words "unlawfully intercepted" in subsection (i) quoted above were "not limited to constitutional violations" 416 U.S. at 527, and that

> "Congress intended to require suppression where there is failure to satisfy *any* of those statutory requirements

> that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *Id.,* at 527. (Emphasis added)

The legislative history mentioned above demonstrates that the inventory notice provisions occupied a "central role in the statutory scheme",[6] and directly and substantially implement the intention to limit the indiscriminate use of interception, justifying enforcement by suppression. Three circuit courts of appeal have so held.

In *United States v. Eastman,* 465 F. 2d 1057 (3d Cir. 1972) the court held that a judge cannot waive the inventory provisions. The court ordered suppression on alternate grounds. First, the court ruled that the interception was not "in accordance with the provisions of this chapter [Title III]" and thus could not be disclosed under the authorization of 18 U.S.C. § 2517(3). *Id.,* at 1062. Second, the court found that the communications were "unlawfully intercepted" and therefore subject to statutory suppression under Section 2518(10)(a)(i); and finally it held that the inventory requirements implement the Fourth Amendment as interpreted by *Berger v. New York, supra,* requiring exclusion of evidence secured in violation of their wording. *Id.,* at 1063.

While the Court of Appeals for the Ninth Circuit remanded the ultimate question of suppression to the District Court in *United States v. Chun,* 503 F. 2d 533 (9th Cir. 1974), it noted the constitutional foundation of the inventory notice (*id.* at 536-538), and further held that "the inventory notice provision is a central or at least a functional safeguard in the statutory scheme." *Id.* at 542.

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[6] *Id.,* at 528.

Finally, and most recently, the court below, in reliance upon this Court's pronouncements in *Giordano,* and approving the analysis in *United States v. Chun,* concluded

> "From our examination of the legislative history of this provision, see United States v. Chun, supra, 503 F. 2d at 537 n. 6, 539-40, 542 n. 12, it is our conclusion that this provision plays a central role in the stautory [sic] scheme to limit and control electronic surveillance and that it directly and substantially implement[s] the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary device. United States v. Giordano, supra, 416 U.S. at 527.
>
> "Suppression is required if there is a breach of a Title III provision that directly and substantially implements the congressional scheme to limit the use of electronic surveillance. We have determined previously that the Government had a duty to disclose the identity of Merlo and Lauer, and that this duty was breached. It is our view that the inventory notice provisions have a central role in limiting the use of intercept procedures. For these reasons we argee [sic] with the District Court that the communications of Merlo and Lauer were "unlawfully intercepted," 18 U.S.C. § 2518 (10)(a)(i), and that suppression is required." P.C. App. 17a.

The decision below is based upon clear congressional intent and Fourth Amendment requirements. It is clearly correct and requires no further review.

(b) There is no genuine conflict between the decision below and the decisions of courts of appeal for other circuits.

The petitioner suggests that the decision below "conflicts with decisions of the United States Courts of Appeal for the Third, Eighth, and Ninth Circuits" (Petition for Certiorari, p. 13), and cites as the conflicting decisions *United States v. Iannelli,* 477 F. 2d 999, 1003 (3d Cir. 1973), affirmed on other grounds, 420 U.S. 770 (1975);

United States v. Wolk, 466 F. 2d 1143, 1145-1146 (8th Cir. 1972); *United States v. Chun,* 503 F. 2d 533, 540 (9th Cir. 1974), upon remand 386 F. Supp. 91 (D. Hawaii 1974). *Id.* at fn. 11. Additionally, the petitioner cites *United States v. Smith,* 463 F. 2d 710, 711 (10th Cir. 1972). *Ibid.*

The government asserts that *Iannelli* and *Wolk, supra,* hold that "good faith error in failing to provide notice of an interception is not grounds for suppression where no prejudice results" (Petition for Certiorari, p. 13 fn. 11); that *United States v. Chun, supra,* applied a lesser standard for identification of unnamed persons than that applied in this case (*ibid.*); and that these decisions therefore conflict with the decision below. For the reasons set forth herein, these decisions do not establish a conflict."[7]

In *Iannelli, supra,* the defendant was found to have had actual knowledge of the information required to be set out in the inventory notice prior to the expiration of the 90-day period,[8] and it was this knowledge that caused the

[7] Petitioner also quotes Commentary, *Standards Relating to Electronic Surveillance,* American Bar Association Project on Minimum Standards for Criminal Justice, p. 160 (Approved Draft, 1971) ("A failure . . . to file the inventory . . . should result in the suppression of evidence only where prejudice is shown"). Petition for Certiorari, page 17, fn. 17. The Commentary, as opposed to the black type standards, was not approved by the House of Delegates, does not constitute ABA policy, and at most reflects the predilections of the Drafting Committee. This commentary is inconsistent with this Court's subsequent ruling that "suppression must follow" when "central" statutory requirements have been "ignored". *U.S. vs. Giordano,* 416 U.S. 505, 529 (1974). The source of the Commentary is *Evans v. United States,* 242 F.2d 534 (6th Cir. 1957) cert. den. 353 U.S. 976 (1957). But the Court of Appeals for the Sixth Circuit declined to apply it to wiretap inventories in the decision below.

[8] This fact was commented on in the remand opinion in *United States v. Chun,* 386 F. Supp. 91, 95 (D. Hawaii 1974), as the distinguishing feature justifying suppression in *Chun.*

court to deny suppression. 477 F. 2d at 1003, and see the District Court opinion, *United States v. Iannelli*, 339 F. Supp. 171 (W.D. Pa. 1972). Such knowledge was expressly found lacking in the case at bar.

In *United States v. Wolk*, 466 F. 2d 1143 (8th Cir. 1972), interceptions were concluded in March 1971 and inventories were ordered served the following June, but there was a lack of service upon two of the persons named in the inventory order until after the ninety-day period specified in Section 2518 (8)(d). However, counsel for these two defendants had actual knowledge of the intercepts and an opportunity to examine the transcripts by late July and early August. *Id.* at 1144. In view of the brief delay and actual knowledge the court, in *Wolk*, held that "the statute has been substantially complied with . . ." *Id.* at 1146. In the present case, there has been no substantial compliance with the statute as regards respondents Merlo and Lauer. They had neither notice nor knowledge of the intercepts for more than a year.

Petitioner's reliance on *United States v. Chun*, 503 F. 2d 533 (9th Cir. 1974), is similarly misplaced. In *Chun* (which was briefly discussed at p. 13, *supra*,) the court reversed the granting of a motion to suppress which had been heard prior to the announcement of this Court's holdings in *Giordano* and *Chavez*, and remanded the case for further consideration in the light of those holdings. *Id.*, at 543. In its outline of the considerations to be entertained on remand the court of appeals ruled, as discussed above, that the government must identify the classes of persons overheard (*id.*, at 540) and give prompt notice to those unnamed individuals against whom it has decided to obtain indictments. *Id.*, at 537. The court of appeals also considered the Fourth Amendment underpinnings of Section 2518 (8)(d) and instructed the district court to determine the constitutional question, noting that "[i]f a constitutional

violation is found, then suppression must follow under the judicially-fashioned exclusionary rule." *Id.* at 538. Finding the lack of any information regarding the unnamed persons to have deprived the district judge of his discretion and violated the "spirit and letter of § 2518 (8)(d)" (*id.*, at 540), and acknowledging that "the inventory notice provision is a central or at least a functional safeguard in the statutory scheme" (*id.*, at 542), the court of appeals further instructed the district court to consider whether that violation justified suppression under Section 2518 (10)(a)(i) even if not of constitutional import. *Id.*, at 543.

On remand, the district court again granted the motions to suppress. Having found that the unnamed persons had actual notice shortly after the expiration of the statutory period, the district court ruled that the Fourth Amendment did not require suppression, but that the violation of Section 2518(8)(d) required statutory suppression. *United States v. Chun*, 386 F. Supp. 91, 94-95 (D. Hawaii 1974).

The fourth decision cited by petitioner, *United States v. Smith*, 463 F. 2d 710 (10th Cir. 1972), involved inventory service which was effected merely 30 hours late, after several timely efforts of the marshal proved unsuccessful because the whereabouts of the defendant were unknown. The court of Appeals held it did not have jurisdiction of the appeal on grounds of prematurity (*id.*, at 712), but by way of dictum characterized the delay as "short" (*id.* at 711) and said that a failure of "strict compliance" did not require suppression absent prejudice. *Ibid.* Dictum on the effect of "short delay" hardly establishes the Tenth Circuit's position on any relevant question, and petitioner, while citing *Smith* (Petition for Certiorari, p. 13), refrained from listing the Tenth Circuit as among those assertedly in conflict.

A brief recap of the foregoing authorities demonstrates that no conflict among them exists. The only decision cited by petitioner which addresses the rights of unnamed persons overheard is *Chun, supra*. While *Chun*

left the position of the Ninth Circuit open on the circumstances justifying use of the suppression remedy, it acually provided the authority relied on below concerning the government's duty, under Section 2518(8)(d), to disclose threshhold information to the court on unnamed persons. None of the decisions cited by petitioner disagrees with this holding.

The decisions of the Third and Eighth Circuits, while referring to a requirement of prejudice, did so in the context of brief delay, actual knowledge and substantial compliance as to persons properly named in the inventory order. See *Wolk* and *Iannelli, supra.* The Sixth Circuit has rejected the necessity of a showing of actual prejudice (P.C. App. 16a), but only in the absence of actual knowledge or substantial compliance.

> "There is no suggestion in the present case that the Government fulfilled its duty under the statute *or that there was even a colorable conformity with the statutory requirements.*" P.C. App. 16a.[9] (Emphasis added).

The Sixth Circuit has taken no position on the effect of brief delay, actual knowledge or substantial compliance. Indeed, the emphasis placed by the court below on the finding that respondents had not been "otherwise notified" suggests its willingness to consider actual knowledge as relevant to suppression. P.C. App. 15a.[10]

In short, none of the decisions cited by petitioner appears to be on a collision course with any of the others.

[9] It is this fact which distinguishes this case from *United States v Chavez,* 416 U.S. 562 (1974) and the court below so noted. P.C. App. 16a.

[10] Nor did the court below rule that these respondents were not prejudiced by a delay of more than one year in providing them with notice that their conversations had been intercepted. The delay had a necessary effect of rendering defense investigation stale and providing tactical advantage to the government.

(c) Supreme Court Review of the Allegedly Conflicting Authorities Is Premature.

As indicated above, there is no conflict among the decisions of the courts of appeal for the several circuits. But even if such a conflict were discernible, Supreme Court review would not be timely. Of the decisions cited by petitioner, only *United States v. Chun,* 503 F.2d 533 (9th Cir. 1974) postdated this Court's elucidation of the principles governing suppression under Title III in *United States v. Giordano,* 416 U.S. 505 (1974) and *United States v. Chavez,* 416 U.S. 562 (1974). The Court of Appeals, in *Chun,* expressly declined to establish a rule for the Ninth Circuit without further District Court proceedings in the light of *Giordano* and *Chavez,* and has not spoken on this subject since.

The court below also regarded *Giordano* and *Chavez* as crucial to the charting of principles of suppression applicable to section 2518(8)(d) and expressly rejected the reasoning of *United States v. Wolk,* 466 F.2d 1143 (8th Cir. 1972) because that decision had been rendered prior to *Giordano.* P.C. App. 16a.[11].

This Court has now held that where a provision of Title III was "intended to play a central role in the statutory scheme . . . suppression must follow when it is shown that this statutory requirement has been ignored." *United States v. Giordano,* 416 U.S. 505, 529 (1974). There is insufficient experience under this recent pronouncement to suggest that the federal judiciary will fail to arrive at a harmonious application of *Giordano* to violations of the inventory notice requirements.

[11] *United States v. Cirillo,* 499 F.2d 872 (2d Cir. 1974) cert. den. 419 U.S. 1056 (1974) was rejected for the same reason. *Ibid.* The cases upon which petitioner relies also lacked the benefit of whatever guidance may be provided by this Court's latest pronouncements on the interpretation of Title III in *United States v. Kahn,* 415 U.S. 143 (1974).

(d) The Issue Of Whether Suppression Is Justified By the Government's Failure To Cause An Inventory Notice To Be Served In This Case Presents No Important Issue Concerning The Administration Of Title III.

The government's own position is that it intended to serve inventory notices on Merlo and Lauer (Petition for Certiorari, p. 15), and that it is the policy of the Department of Justice "to provide the supervising judge with the name of every person who has been overheard if there is judged to be any reasonable possibility that the person will be indicted." *Id.* at 12, fn. 10. Therefore, whether the omission of notice to Merlo and Lauer is characterized as deliberate, negligent, or merely inadvertent, a Supreme Court decision on this case will not affect public policy.

Unlike the decisions in *Giordano* and *Chavez*, which were necessary to define the government's obligations in authorizing applications for surveillance orders under Title III, and unlike this Court's decision in *Kahn*, which was necessary to guide the government in naming target individuals in the application for a surveillance order, a Supreme Court determination in this case would not apprise the government of anything it needs to know in the utilization of Title III. All that is in issue is suppression of a wiretap where the government failed to carry out its ostensible plan to give notice to two indicted individuals.

It is too early in the administration of "this relatively new federal statute,"[12] to assume that the government will habitually fail or neglect to furnish the court with the names of positively identified persons against whom it intends to seek indictments.

[12] *United States v. Kahn*, 415 U.S. 143, 150 (1974).

Prior to a demonstration that deliberate or negligent omissions from inventory orders are a chronic problem in the administration of Section 2518(8)(d), review of the suppression remedy for such failures is unnecessary and premature.[13]

[13] Petitioner's final footnote tentatively suggests that "[i]t *may* also be that admission of the incriminating statements of Merlo and Lauer is required by 18 U.S.C. § 3501(a) and (e)." Petition for Certiorari, p. 18 fn. 19. (Emphasis added). This statute, which generally provides procedures and standards for the determination of voluntariness of confessions, does not abrogate the right of an accused to have evidence excluded on other constitutional or statutory grounds. *Cf. United States v. Schipani*, 289 F. Supp. 43, 59-60 (D.C. N.Y. 1968), affirmed 414 F. 2d 1262, cert. den., 397 U.S. 922 (1970). Obviously, 18 U.S.C. § 3501 was not intended to amend the suppression sections of Title III or the exclusionary rule under the Fourth Amendment.

CONCLUSION

For the foregoing reasons, respondents Merlo and Lauer urge this Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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